In the Supreme Court of the United States

October Term, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts, et al.,
Appellants in No. 78-329,
and
JANE HUNERWADEL,
Appellant in No. 78-330

v.

WILLIAM BAIRD, et al.,
Appellees in Nos. 78-329, 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEES

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Appellees respectfully submit this brief in support of the decision of the three-judge district court, and ask that the judgment below be affirmed.

Statement of the Case

The statement by Appellees should be supplemented as follows:

I. THE PARTIES

At the first trial of this matter, Mary Moe testified in camera before the three-judge federal court. At that time she was age sixteen and lived at home with her parents and three other siblings. (Tr. 131, Dec. 31, 1974).[1] She was in the tenth grade. (Tr. 145).

When Mary Moe first thought she was pregnant, she sought a pregnancy test at a health clinic in her home town. She had to wait 43 days, however, before such a test would be definitive. During that time, she considered the alternatives to an abortion such as continued pregnancy and/or adoption. (Tr. 133). She discussed these options with two of her girlfriends and her oldest sister. (Tr. 141).

Mary Moe made a carefully reasoned, sensitive decision not to inform her parents of the pregnancy and her planned abortion. As the District Court stated:

> "Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boyfriend. . . . Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." *Baird* v. *Bellotti,* 393 F. Supp. at 847, 850 (D. Mass. 1975), (Baird I).

[1] All references to testimony by Mary Moe are to the impounded second transcript volume of the first trial (Baird I) dated December 31, 1974, which is on file with the Court. The facts concerning testimony given at the first trial were contained in the Brief of Appellees filed in this case during the October Term, 1975 and are reproduced here for the Court's convenience. The second trial resulted in the opinion reported at 450 F. Supp. 997 (D. Mass. 1978) referred to in this brief as *Baird* III.

Mary Moe showed particular and respectful concern for her mother and father. She testified that her mother "would get very upset . . ." (Tr. 134), and "might have a breakdown. . . ." (Tr. 136) She also commendably "wanted to finish school," (Tr. 135) and did not want to be "kick[ed] out of the house. . . ." (Tr. 135). While she could have legally remained in attendance at high school, she understandably chose to avoid the well recognized "additional difficulties and continuing stigma of unwed motherhood. . . ." *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). Appellants produced no evidence that attending school while pregnant and unmarried could be beneficial to a sixteen year old young woman.

Appellants have not questioned the reasoning or sensitivity of Mary Moe in deciding to protect her parents from the knowledge of her pregnancy and abortion. Nor have Appellants suggested in any way that parental involvement might have added to the quality of her decision or her medical care. It was Mary Moe, not the Commonwealth, who showed positive concern for harmonious preservation of the family unit. The District Court found that

> "she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort. . . . [*S*]*he was competent to make and effectuate that decision. . . .* [*S*]*he is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents.*" *Baird* I at 850 (Emphasis supplied).

The women's health clinic provided Mary Moe with "different names of different places you could go. . . . [I]t was up to [her] to choose. . . ." (Tr. 136). They also gave her educational material on different methods of birth control and abortion. (Tr. 136). She had only $20 and borrowed $5 more from her sister. (T. 140). The health clinic listings of abortion centers gave Parents' Aid Society as "the only place that listed anything about financial trouble." (Tr. 140).

Parents' Aid and Dr. Zupnick accepted Mary Moe as a patient for the $25 fee, reduced from the usual $150.[2] (2 App.-177).

In addition to the informational material provided Mary Moe, she received about two hours of professional counseling at Parents' Aid Society from a trained registered nurse, Marilyn Morrissey. (Tr. 140). This included a discussion of the abortion procedure, birth control, breast cancer, and related topics. (Tr. 141) There was ample opportunity to ask questions. (Tr. 141). Previously, Mary Moe had received no sex education at school or in her home and had been unable to obtain contraceptives because she was under age 18. (Tr. 132, 146).

When Mary Moe first telephoned Ms. Morrissey, she was encouraged to tell her parents of the pregnancy if possible. (Tr. 143: "[I]f you can tell them, you probably should. . . ."). She chose not to do so for the reasons stated.

In view of the rapidly approaching effective date of the statute (November 1, 1974), Parents' Aid Society and Dr. Zupnick scheduled Mary Moe for her abortion on the evening of October 31, 1974, rather than the following week as she had requested. (Tr. 138).

[2] The regular practice of accepting patients for such sharply reduced fees, and Mary Moe for $25, is consistent with the nonprofit structure of Parents Aid Society, Inc. Fifteen percent (15%) of the patients pay no fee. *Baird* I at 851.

Mary Moe had heard about the statute from a girlfriend and volunteered to be a plaintiff. (Tr. 138). She offered to "do" an affidavit. (Tr. 148). Her sworn statement was presented to the single district judge in support of the motion for a temporary restraining order. (Tr. id.)

As scheduled, and after the order was granted, Mary Moe obtained her abortion. There were no complications. (Tr. 142). She had no bad dreams or depression following the procedure. (Tr. 167). The District Court fully credited her testimony. *Baird* I at 850 and nn. 4-5.

The other plaintiffs also testified extensively and were supported by prominent expert witnesses.

William Baird, who earlier before this Court successfully challenged the Massachusetts birth control laws, see *Eisenstadt v. Baird,* 405 U.S. 438 (1972) is the director of Parents' Aid Society, Inc. as well as its chief counselor. Baird claims standing because of the threat of prosecution as an aider, abettor, or accessory before the fact.

As the District Court noted, Baird "had been arrested without warning in connection with the Massachusetts birth control statute, so-called. . . . [He] had every reason to believe that they had only two alternatives — to continue their current activities and face immediate arrest, or to bring the present suit." *Baird* I at 852. Previously, Massachusetts authorities went so far as to arrest an Ohio clergyman for merely referring a woman to Massachusetts for an abortion.[3] Baird is much more overtly involved in pre-abortion counseling as director of an abortion center. His standing to sue is clear.[4] The probability of Baird's

[3] *Commonwealth* v. *Hare,* 361 Mass. 263, 280 N.E.2d 138 (1972). A second clergyman was prosecuted on similar facts in *Commonwealth* v. *Schaflander,* 361 Mass. 850, 279 N.E.2d 670 (1972). The accessory before the fact statutes are MASS. G.L. c. 272, § 19, & c. 274, § 2.

[4] The discussion in *Eisenstadt* v. *Baird* further supports this conclusion. 405 U.S. at 443-446. *Accord, Doe* v. *Bolton,* 410 U.S. 179, 188 (1973) (physcian standing); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

having been prosecuted for continuing his counseling activities is far greater than that expected by an out-of-state clergyman passing out telephone numbers to pregnant women. He has as much standing as Mary Moe or Dr. Zupnick, the co-appellees, or the theater manager in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 n.16 (1975). The District Court found it unnecessary to resolve the dispute over Baird's standing. *Baird* I at 851. Baird is a proper party in this appeal and views the issue as highly important to counselors, nurses, and auxiliary health personnel in view of the *Hare* and *Schflander* prosecutions. In light of his independent status as an Appellee he asks this Court for a definitive ruling.

Dr. Gerald Zupnick, principal operating physician at the Parents' Aid Society Boston abortion center, testified to his practice and experience with first trimester abortions, and with minor patients.

It was uncontradicted that other abortion centers referred patients to Parents' Aid Society, particularly "minors who do not have parental consent or patients who do not have the usual fee . . . ." (2 App. 167). About 15% of the patients are treated free of charge.

Dr. Zupnick had not encountered any minors incapable of giving an informed consent. (2 App. 169). He thought this to be possible only in case of "mental retardation." (App. Id.). About 30% of the patients at Parents' Aid are minors, and about one-half of those preferred not to inform their parents. (2 App. 184). Dr. Zupnick has encouraged minors to inform their parents. (App. id.)

The bulk of Dr. Zupnick's testimony consisted of an explanation of what transpires during the four or five hours a patient is at the abortion center. He explained that

> "[m]ost often [the patient's reaction] is relief at the completion of the procedure and surprise as to simplicity. . . ." (2 App. 172).

This was explained in part by the fact that "most younger patients do not have the usual stigmata of illegal abortion in their heads." (2 App. 174). Reactive guilt or hostility were "rare." (2 App. 172).

There was a 75% follow-up of patients by one of "several cooperating physicians" in the Boston area. (2 App. 172-173).

Appellants, as advocates, have attempted to portray the Parents' Aid abortion center as an assembly line impersonal operation. The Record is to the contrary.

II. EXPERT TESTIMONY

(A) *The first trial — Baird I*

Defendants' and Defendant-Intervenors' expert, Dr. Jules Rivkind "[had] not performed abortions under any circumstances." (2 App. 231). He was the sole gynecological expert called by Appellants. The hospital at which he was chairman permitted no abortions, no sterilizations, and no use of birth control pills, except "for the control of gynecological problems." (2 App. 227). He had conducted no research and written no articles on abortion or adolescent pregnancy. (2 App. 229).

Dr. Rivkind admitted that "90% of the first trimester abortions in this country are performed outside of hospitals. . ." (2 App. 236), but still insisted that the procedure was unsafe.

In view of his admitted bias and limited background, Dr. Rivkind was unqualified to offer competent testimony concerning minors' access to elective abortion. He opposed such access categorically, did not support the policy on

abortion of the American College of Obstetricians and Gynecologists, and was opposed to the position taken in *Roe* v. *Wade,* 410 U.S. 113 (1973).

Dr. Rivkind did not require parental consent for minors seeking treatment of V.D., because Pennsylvania state law did not require such consent. (2 App. 230). Presumably he wouud follow a law or decision waiving parental consent in the abortion area also.

Defendants and Defendant-Intervenors also called a child psychiatrist, Dr. Raymond Yerkes. He had conducted no studies and written no articles on the subject of adolescent pregnancy. (2 App. 254-55) Dr. Yerkes had dealt with only about 30 pregnant patients under age 18 in the last twelve years. (2 App. 245).

He thought that minors under age 18 could give an informed consent to V.D. treatment. (2 App. 256). Dr. Yerkes admitted that "some" unmarried minors when pregnant could rise to the responsibility of making their own life decisions. (App. Id.) Significantly, Dr. Yerkes admitted that 17 year olds who chose not to abort would need more professional support than those who obtained abortions. (2 App. 529) He agreed that "emotional support can be provided for a pregnant minor without requiring parental consent." (2 App. 261) He further admitted that the desirability of abortion for a minor "depends upon the individual circumstances of the patient and the family and the particular situation in life." (2 App. 264) Finally, Dr. Yerkes acknowledged that

> "there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. . . . [I]n this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role." (2 App. 266).

Plaintiffs' expert Dr. Somers H. Sturgis, professor emeritus in gynecology at Harvard Medical School was the gynecological consultant to the first Adolescent Clinic in the United States. (2 App. 4). He is "closely allied to a clinic in the neighborhood of Boston where legal abortions are done. . . ." (2 App. 12-13). About 10% of their patients are under 18. (2 App. 13).

Dr. Sturgis testified that:

> "[A]ge is no criterion of development and maturity. . . . [E]ach individual must be judged by the doctor . . . most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help." (2 App. 12).

He stressed that unwanted pregnancy is a "social and emotional tragedy to an adult," but "even worse" and a "much more serious predicament" for a minor. (2 App. 7).

Dr. Sturgis saw no medical reasons for denying abortions to persons under age 18.[5] He stated:

> "[A]t 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment." (2 App. 15).

As to the minor patients' psychological reaction to an abortion, Dr. Sturgis stated: "[I]n the vast majority of cases the young people are tremendously relieved." (2 App. 17).

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[5] Indeed, he stated: "[T]he younger the child the higher the risk with an unwanted pregnancy." (2d App. 16).

Dr. Jane E. Hodgson, associate professor at the University of Minnesota, a Mayo Clinic graduate, and the author of numerous leading studies on first trimester abortion, testified next. Dr. Hodgson supervised over 25,000 such abortions as Medical Director of Pre-Term in Washington, D.C. About 11% of those patients were under age 18.

Dr. Hodgson explained that minors have a greater need for abortions than adults because with term pregnancy "the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternal mortality is much higher. . . ." (2 App. 30). She pointed out that "[t]eenage pregnancy is very disruptive in the family." (App. id.).

As to the ability to understand the abortion procedure and given an informed consent, Dr. Hodgson observed:

> "I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally sub-normal individual." (2 App. 32).

She has found that "some 12-year olds will be more mature than 18-year olds." (2 App. 34). She had seen a 13-year old patient capable of giving an informed consent and a 19-year old who lacked such understanding and capacity. (2 App. 35).

Dr. Hodgson illustrated some of the types of situations in which parents should not be told of a teenage daughter's pregnancy:

> "Illness on the part of the parents . . . where patients are concerned over their father's coronary status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord." (2 App. 37).

She answered the charge of physician conflict of financial interest by pointing out that fees for prenatal care and delivery are usually higher than those for abortion. (2 App. 41).

The third Plaintiff expert was Dr. Carol Nadelson, an assistant professor of psychiatry at Harvard Medical School and a psychiatrist at a major Boston hospital. She had extensive experience for "several years" "evaluating pregnant teenagers." (2 App. 42) She has published numerous articles relating to teenage sexuality, abortion and counseling in the medical literature.

Dr. Nadelson emphasized that a requirement of parental consent delays an abortion procedure and that this is hazardous to the patient, both medically and psychiatrically. (2 App. 43-44). She observed that parents of pregnant teenagers "often feel guilty and angry. They may feel punitive towards the child. . . ." (2 App. 45).

Most minors she evaluated who had abortions "felt relieved by it. They feel that they have done the right thing and have a second chance often." (App. Id.) Less than 1% have clinically significant guilt or experience regret. (App. Id.).

Dr. Nadelson's experience was that most 17-year olds can give an informed consent. She stated: "I think the difficult time is in the 11, 12 and 13-year olds that we see. It is much more time consuming and difficult for them to understand what it means." (2 App. 47). She had had particularly difficult cases such as parents of a 13-year old who opposed an abortion on religious grounds. (App. Id.). She agreed with Dr. Hodgson that "one can find a 13-year old who is better able to make a decision than a 17-year old." (2 App. 132).

Asked whether parents are most suited to provide emotional support to a pregnant teenage daughter, Dr. Nadelson replied: "Some are and some are not." (2 App. 133).

She explained that parents "may at times be the worst people that one could talk to because they are so upset." (2 App. 134).

Finally, it was also Dr. Nadelson's experience that she had encountered no one in the 12 to 17 year old group who could not give an informed consent. (2 App. 142). She knew of only one instance in which case the patient was mentally retarded (2 App. 142-143).

(B) *The Second Trial, Baird III*

At the second trial, the Defendants called Sprague W. Hazard, a Massachusetts physician. As a member of the American Academy of Pediatrics Dr. Hazard assisted in the drafting of "A Model Act Providing for Consent of Minors for Health Service." With regard to a hypothetical assessment of the impact on the pregnant minor and her family of the situation where the "parents are unalterably opposed to the abortion and where the adolescent has been forced, because she wants an abortion, to bring a complaint in court and ask the court for assistance," Dr. Hazard responded that ". . . the child has become a pawn in that situation." She might "suffer severe psychological trauma as a result . . ." and that "it would be an unfortunate experience." (2 App. 421-422) An additional question concerning the same subject brought this response from Dr. Hazard:

> "It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future." (2 App. 426).

Dr. Carol Nadelson again testified on behalf of the Plaintiffs. She stated "that the impact of the requirement to initiate judicial proceedings of any kind would be severly detrimental to a teenager, particularly since she has just met with her parents' disapproval, which is difficult enough." (2 App. 296) Based on her past experience she suggested that rather than "confront their parents" or "any other authority about the problem" . . . pregnant minors may avoid these problems "by going out of state, by attempting abortions themselves or finding non-medical means of obtaining abortions . . ." (2 App. 300).

In considering the Massachusetts statute which permits certain classes of emancipated minors to consent to all types of medical and surgical care, except for abortion and sterilization, Dr. Nadelson was struck by the fact that ". . . a teenager could probably consent to a hysterectomy and not to an abortion."[6] (2 App. 307). Abortion, in the

[6] Mass. General Laws ch. 112 § 12F provides as follows:

> "No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.
>
> "Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.
>
> "Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

first trimester has less physical risks than many other medical and surgical procedures, including hysterectomy. Furthermore, ". . . abortion in and of itself does not have serious psychological consequences . . . which might be found in other procedures such as hysterectomies . . . where the person is either more ill to begin with or the repercussions later on for her life would be more severe." (2 App. 313-314). Carrying a pregnancy to term has a greater impact on the adolescent than having an abortion. (2 App. 314).

In response to a question about whether parents could be of help in making sure the teenager got some type of counseling, Dr. Nadelson agreed that "[t]hey could," and added "but they often don't." (2 App. 546) She felt that

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility; (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

counseling for minors experiencing unwanted pregnancies was very important but that there was a serious lack of resources for this purpose. (2 App. 500).

Dr. Nadelson reiterated that the abortion decision cannot be viewed in isolation. The consequences of carrying to term must be evaluated. "The future orientation vis-a-vis the continuing pregnancy is far more difficult than vis-a-vis an abortion because the implications are lifelong and unchangeable, and evidence is that people certainly have more effects either from having a child they don't want and trying to bring it up or giving a child up for adoption. . . . Having the abortion has some effect, like any crisis people have in their lives, and people have lots of them. Having a pregnancy and continuing is something that somebody lives with the rest of their life." (2 App. 548-549)

In sum, the testimony for Appellees does not detract from but in fact supports Appellants. All parties admit that emotionally supportive parental involvement should be encouraged if at all possible. It is destructive, however, to the family unit for the Commonwealth to compel such involvement over the objection of physician and patient in every case. That is the objectionable quality of the statute in question. "[O]ne's experiences [and] one's exposure to the raw edges of human existence"[7] compel recognition of the fact that minors and the family unit need protection from the disruption which might erupt from applying this statute.

III. ADDITIONAL FACTS IN EVIDENCE

Statistical evidence about teenage sexuality and pregnancy was introduced through a publication of the Alan

[7] *Roe* v. *Wade*, 410 U.S. at 116.

Guttmacher Institute entitled "11 Million Teenagers".[8] This publication gathers together in a convenient format the most recent data on adolescent sexuality, pregnancy and childbearing. These data show that teenage childbearing rates in the United States are among the world's highest; half of unmarried women have intercourse by age 19; 11 million American teenagers are sexually active; one million teenagers become pregnant each year; over over 600,000 teenagers give birth each year; one-fifth of all births in the United States are to teenagers; nine out of ten of these teenage mothers keep their babies; one-third of births to teenage mothers are out of wedlock; one-third of births to married teenage mothers are conceived prenuptially; two-thirds of teenage pregnancies are unintended; babies of teenage mothers are more likely to die soon after birth than babies of older mothers; babies of teenage mothers are more likely to be premature and of lower birth weight than babies of older mothers; the risk of maternal death, illness or injury are greater for teenage mothers than for older mothers; teenage mothers are not likely to complete high school; pregnancy is the most common cause of female school dropouts; teenage mothers face greater risks of unemployment and welfare dependence than older mothers; the younger the woman at the time of her first birth, the poorer her family is likely to be; teenage marriages are much more likely to end in divorce and separation than are marriages between persons in their twenties; teenage mothers are less likely to get prenatal care than older mothers; birth control services are not available to a substantial number of teenagers; and one-third of abortions are obtained by teenagers.

During the discovery process prior to the second trial, the State defendants admitted the following facts in re-

[8] "11 Million Teenagers, What Can be Done About the Epidemic of Adolescent Pregnancies in the United States," The Alan Guttmacher Institute, New York, 1976. This booklet comprises Volume 3 of the Record in this case.

sponse to a request for admissions: (1) that there are minors under the age of eighteen who are intellectually and emotionally able to comprehend the abortion procedure and its consequences; (2) that delay in the abortion decision or its effectuation can cause psychological and medical problems; (3) that there are parents who are not supportive when they learn of an unmarried daughter's pregnancy; (4) that there are minors who correctly fear that physical harm would come to them if one or both of their parents knew of their pregnancy; (5) that there are parents of pregnant minors who would under no circumstances consent to an abortion for their daughters; (6) that there are parents who would attempt to make their pregnant minor daughters enter into marriages the daughters do not want; (7) that there are minors who do not want to inform their parents of their pregnancies because they do not want to cause their parents distress; (8) that there are parents who would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson; (9) that the incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating; (10) that teenage motherhood invokes a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations, including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion; (11) that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth; (12) that time, of course, is critical in abortion.

Risks during the first trimester of pregnancy are admittedly lower than during later months.

The facts admitted above were drawn for the most part from findings made by the three-judge court in *Baird* I. It is safe to say that facts concerning teenage pregnancy and the abortion experience as related to the issues in this case are substantially not disputed. It is also overwhelmingly clear that all experts agree that a decision arrived at by the pregnant minor and her parents which reflects the minor's best interests is the ideal situation. However, for many adolescents parental awareness of the pregnancy could seriously endanger their wellbeing. The alternatives for these adolescents are bleak indeed.

IV. FINDINGS OF THE DISTRICT COURT

(A.) *The First Trial — Baird I*

First, the three-judge court upheld the class action nature of this litigation, holding:

> "We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. . . . [T]hey have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all." *Baird* I at 852.

As to medical facts the District Court found that an abortion in the first trimester does not impose "any greater risks for minors than for adults." *Baird* I at 853.

The District Court found that parental support is desirable in general but that "an appreciable number[of parents] are not [supportive] for a variety of reasons." *Baird* I at 853. Also, "parents may seek to control sexual behavior by threats that they do not mean, or would not carry out . . . but which nonetheless serve to destroy intercommunication." *Baird* I at 853.

Significantly, the District Court held:

> "We *must find,* however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." *Baird* I at 853 (Emphasis supplied).

The evidence on this point was overwhelming. It supports the view of Appellees that a statute requiring consent of one parent, or consultation with a parent, or notice to a parent, would invade the patient's privacy as much as the one at issue here.

The three-judge court further found that:

> "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them. . . ." *Baird* I at 853.

The District Court "accept[ed] the testimony of plaintiffs' experienced expert[s] that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson." *Baird* I at 854.

Also, the Court found as "fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." *Baird* I at 854.

On the capacity of minors, the District Court held:

> "[A] substantial number of females under the age of 18 are capable of forming a valid consent." *Baird* I at 855.

(B.) *The Second Trial — Baird III*

In its second full opinion, the District Court again found that "many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." *Baird* v. *Bellotti,* 450 F. Supp. 997, 1001 (1978) (*Baird* III) It also recognized that, "it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge." *Id.* at 1001

> Parents, physically or emotionally unwell, may be injured by the shock, [of the pregnancy] thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions." *Id.* at 1001.

Based on the testimony of Defendants' expert, the District Court found that "a substantial number of minors would refuse to consult with their parents under any circumstances." *Id.* at 1001. The Court went on to cite the uncontradicted testimony of Plaintiffs' expert:

> ". . . that court proceedings over such a personal matter, even if conducted in the most benign manner, would be 'severely detrimental to a teenager . . .' Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely to destroy what was left of the family relationship. The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert, she is likely to find herself in an even worse position." *Id.* at 1001-1002

A mature minor who has been refused an abortion she desired would suffer "a highly traumatic experience." *Id.* at 1003.

Under Massachusetts law, the only surgical procedures to which a mature minor may not consent are abortion and sterilization.[9] The evidence before the three-judge court "shows that many other forms [of surgery] are far more complicated and dangerous." *Id.* at 1003-1104

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[9] See Mass. General Laws ch. 112 §12F reproduced in footnote 6.

The abortion decision cannot be viewed in isolation; if an abortion is not performed, childbirth is the inevitable result. With respect to these issues the Court found the evidence supported the conclusions of *Roe* v. *Wade,* 410 U.S. at 149, namely, that pregnancy and childbirth involve greater risks both physically and psychologically than an abortion performed in the first trimester.[10] *Id.* at 1004

The evidence presented by the Plaintiffs, much of which was corroborated by Defendants' own experts and Defendants' responses to Plaintiffs' Requests for Admissions, fully and amply justifies the findings and conclusions of the three-judge court.

Summary of Argument

In the first part of their Argument, Appellees discuss the constitutional questions at issue in this case. The statute requires parental consultation or notification whenever a pregnant minor seeks to obtain an abortion. If a minor is not able to obtain the consent of her parents, she must then petition a judge of the Massachusetts trial court for permission to obtain the desired abortion. The judge can overrule the minor's considered decision to obtain an abortion. The requirement of parental consultation or notification and the possibility of a judicial veto make the statute as construed by the Supreme Judicial Court vague and overbroad and unduly burdensome in light of the minor woman's constitutional right of privacy. Furthermore, the statute denies equal protection of the law by singling out abortion without justification for specialized treatment.

[10] Dahling, et al., *Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women,* The New England Journal of Medicine, Vol. 297, no. 23 (December 8, 1977). This study showed that there is no relation between induced abortion and subsequent abnormal outcome of pregnancy.

Appellees' second argument refutes Appellants' contention that the District Court abused its discretion in refusing to permit the Attorney General to conduct a survey of health care practices. The District Court's discretion was properly exercised in light of the tardiness of the Appellant's request. Furthermore, the Attorney General made no attempt to mitigate the supposed error by presenting evidence on this subject at trial.

In argument III Appellees discuss the issue of whether or not the District Court properly allowed plaintiffs to proceed against the statute in a facial attack. The Fourth argument concerns the propriety of the injunction entered by the three-judge court and the reasons why this particular statute could not have been revised judicially.

Lastly, Appellees argue that the District Court order concerning costs was a proper one.

Argument

I. The Statute as Construed by the Massachusetts Supreme Judicial Court Is Unconstitutionally Overbroad and Unduly Burdens the Minor's Right of Privacy.

A. *Minors' Right to Privacy*

As this Court said in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 74 (1976):

> "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

Minors are not excluded from the constitutionally protected right to privacy. The holding in *Eisenstadt* v. *Baird,*

405 U.S. at 453, did not distinguish between minors and adults in defining the right to privacy as ". . . the right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis supplied)

The Supreme Judicial Court has construed the statute to require parental consultation in every case:

> "Parental consultation for an abortion is required by the statute in all cases. *Baird* v. *Attorney General*, 1977 Mass. Adv. Sh. 96, 111 (1977).
>
> . . .
>
> "Section 12(S) in turn is explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion. *Id.* at 106.
>
> . . .
>
> "If they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate." *Id.* at 113.

The District Court found that Mary Moe represents a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent and who do not wish to involve their parents. *Baird* I at 850. However, the Supreme Judicial Court determined that Mary Moe and her class *must* obtain the consent of both parents for an abortion, or they *must* go to court and initiate judicial proceeding in which their parents *must* be involved. Failure to obey the statute as construed can result in criminal sanctions.[11]

[11] See Mass. G.L. c. 112 §12Q and §12T. In addition, the attorney general or parent may petition for an injunction against the performance of an abortion to be performed contrary to the statute. Mass. G.L. c. 112 §12R. The Massachusetts Supreme Judicial Court has recognized that: "[i]njunctions and other threats against licensed physicians may drive determined women into the waiting offices of persons not licensed." *Doe* v. *Doe*, 365 Mass. 556 (1974).

A state-created obstacle need not be absolute to be impermissible. It is enough that it unduly burdens the exercise of a fundamental right. *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Carey* v. *Population Services International*, 431 U.S. 678; 97 S.Ct. 2010 (1977). The statute here is just such an obstacle.

The Massachusetts Supreme Judicial Court reviewed the history of the "mature minor" rule in Massachusetts in its opinion on the questions certified in this case. After a lengthy discussion, the Court said:

> "We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case, although judicial involvement is not required, court approval may be sought, and, if it is, a judge may give effective consent to the performance of an operation or other treatment." 1977 Mass. Adv. Sh. at 111.

The Court then stated that §12(S) changed this rule and mandated parental consultation in all non-emergency abortions.

Thus, the statute demands that a minor who is capable of giving informed consent must jump another hurdle before being allowed to exercise her constitutional right. She must get the consent of both her parents, and, if refused their consent, she must then go to court with her parents as defendants. 1977 Mass. Adv. Sh. at 114. This

is the kind of "substantial and irrational roadblock" which this Court declared unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179, 198 (1973).

The double layer of consent here is similar to the system declared unconstitutional in *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973). In that case the Court declared invalid provisions in the state law which required that access to abortion by a consenting mother be subject to the consent of others in all cases (husband, father of the fetus, parents, or the district court).

Therefore, the statute is far different from the one in the picture painted by the defendants for the Supreme Court:

> ". . . a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests." *Bellotti* v. *Baird*, 428 U.S. 140, 143 (1976).

The District Court found that "the penalty borne by the minor—the burden of seeking a court order—is a heavy one." *Baird* III at 1001. Although finding plaintiffs' arguments concerning the inherent unconstitutional burden placed on the minor by a court proceeding under §12(S) persuasive, the three-judge court decided the issue on a more limited basis, and held that "it is an improper burden on those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision." *Baird* III at 1002.

In *Wynn* v. *Carey*, 582 F.2d 1375, 1388 (1978), the Seventh Circuit upheld a preliminary injunction against an Illinois statute[12] patterned after §12(S) stating:

> If one or both of the parents refuse to consent to the abortion, the Act requires that the minor must initiate judicial proceedings to override this veto. We find this to be an undue burden such as that held unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179 (1973).
>
> A decision to obtain a court order presupposes an awareness of the existence of the remedy, an awareness simply not possessed by many minors. In these circumstances, as the district court correctly noted, "[i]f she is uninformed in this regard [availability of a judicial remedy] the parents' de facto refusal

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[12] The material parts of the text of the Illinois Abortion Parental Consent Act of 1977, Ill. Rev. Stat. ch. 38 §81-51 et seq. are as follows:

Section 4. No abortion shall be performed in this State if the woman is under 18 years of age and has not married except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the minor, 48 hours prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion; and

(3) After the consent of her parents is secured and certified in writing.

If one of the parents has died, has deserted his or her family, or is not available, consent by the remaining parent is sufficient. If both parents have died, have deserted their family, or are not available, consent of the minor's guardian or other person standing in loco parentis is sufficient.

If such consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child. Such a hearing will not require the appointment of a guardian for the minor. Notice of such hearing shall be sent to the parents of the minor at their last known address by registered or certified mail. The procedure shall be handled expeditiously.

becomes a de jure veto . . ." *Wynn* v. *Scott*, 448 F. Supp. 997, 1004 (1978). Indeed, from a practical standpoint, the parental veto under this statute is the same as the veto struck down in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

The difficulties that a minor faces are not less formidable for one who is aware of the procedure. Even if aware, the minor is faced with the enormous burden of going to court, without legal assistance and in opposition to her parents' wishes. Many minors may simply not go to court and instead resort to an illegal or self-procured abortion.

In other medical situations where the wishes of the parents differ from the interests of the minor, the state, the physician or the hospital brings suit on behalf of the minor. *Custody of a Minor*, 1978 Mass. Adv. Sh. 2002. Defendants' expert, Dr. Rivkind, acknowledged that "*we* have had situations primarily in terms of blood transfusions, and *we* have had recourse to the court and requested the court to act as guardian for the minor" (emphasis supplied) (2 App. 238) See *Jehovah's Witnesses* v. *King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff.* 390 U.S. 598 (1968) for discussion of court procedures for blood transfusions.

Furthermore, even the most expeditious proceeding will delay the abortion decision. The defendants have admitted that "[t]ime, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months." (1 App. 401). They also admit that delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester. (1 App. 408).

Delay of even a few days can make the difference in the medical risks of the abortion or may even mean that it may not be performed.

> "[T]he delay involved in first trying to obtain parental consent followed by the delay inherent in any judicial proceeding is unreasonable. It might force the minor into either a second trimester abortion which is more dangerous and expensive or into not having an abortion at all if the second trimester has expired." *Wynn, supra*, at 1389.

Thus, the statute does "impose burdens more serious than those suggested" and "create . . . interference with the doctor-patient relationship." *Bellotti*, 428 U.S. at 148.

B. *There is no state interest which §12(S) serves which is sufficiently significant so as to outweigh the minor's fundamental right of privacy.*

"[W]hen a State, . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for accomplishment of some significant State policy requires more than a bare assertion, . . . that the burden is connected to such a policy." *Carey* v. *Population Services International*, 97 S.Ct. at 2022. In that case this Court struck down as unconstitutional a New York law prohibiting the distribution of non-prescription contraceptives to those under 16 years of age.[13] It is to be noted that the test for restrictions on minors' fundamental rights has been cast in different terms. "State restrictions inhibiting privacy rights of minors are valid only if they serve

[13] The burden of proof is on the Appellants *See Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554, 563-4 (E.D. Pa. 1975) aff. 428 U.S. 901 (1976).

'any significant state interest . . . that is not present in the case of an adult.' *Carey,* 97 S.Ct. at 2021.

The Appellants have maintained that the State has several significant interests: Support of the family unit,[14] assurance that an abortion decision is guided by the parents in the minor's interest, and the health and welfare of youth. These are admirable goals. However, the evidence shows that the establishment of a requirement for parental consultation in *all* cases undermines, rather than supports, these interests.

The defendants admit that there are situations in which the parents of a pregnant minor would not be supportive, or in which parental involvement would be detrimental to the minor's best interest. (1 App. 402-403).

As the District Court noted, "[t]he state's power to limit this right [to abortion] should extend only to protect the minor from the special circumstances of her minority —immaturity, and the lack of informed understanding. Instead, the statute imposes upon the minor the very disability which has been found not to exist, and does so uniquely in the area in which the Court has determined she has Constitutional rights." *Baird* III at 1003.

The Appellants have argued that the purpose of the statute is to insure the minor makes a wise decision with an understanding of all the available options. In deciding that a Wisconsin statute which provides that parents having minor children not in their custody must obtain a court order granting permission to marry was unconstitutional, this Court found that:

> There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counselled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counselling was completed. The statute actually enacted, however, does not expressly require or provide for any counselling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counselling of the persons within its coverage. Even assuming that counselling does take place—a fact as to which there is no evidence in the record—this interest obviously cannot support the withholding of court permission to marry once counselling is completed. *Zablocki* v. *Redhail,* — U.S. —, 98 S.Ct. 673, 682 (1978).

Likewise, §12(S) does nothing to insure that any counselling by parents, judges or others will take place, and therefore it fails in the purpose Appellants have ascribed to it.

Due process requires that "[w]here certain 'fundamental rights' are involved, . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake . . ." *Roe* v. *Wade, supra,* at 155. This, §12(S) clearly does not do, and it is therefore unconstitutional.

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[14] As the Court said in *Poe* v. *Gerstein,* 517 F.2d 787, 794 (5th Cir. 1975), aff. 428 U.S. 901:

> "in the abortion context the requirement of parental permission is unlikely to achieve the state's aim of insuring the preservation of the family. If a minor's pregnancy has fractured the family structure, importation of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit."

The prospect of a minor then suing her parents under the Massachusetts statute can do nothing but compound the family disruption. *Baird* III at 1002.

C. *The statute violates equal protection standards by singling out abortion as a procedure for which no minor alone can give consent.*

The Massachusetts Supreme Judicial Court has determined that the mature minor rule applies in the Commonwealth, in the absence of any statutory limitations. 1977 Mass. Adv. Sh. at 111. The District Court previously found that "a substantial number of females under the age of 18 are capable of forming a valid consent [to abortion]." *Baird* I at 855. Therefore, §12(S) as interpreted abrogates the common law right of these minors to give their informed consent to an abortion.

The distinction between consent procedures applicable to minors in the area of abortion and the consent required in regard to other medical procedures has been intensified by the enactment of the amended §12(F). See footnote 6. That section allows certain minors, including one who is a parent, is a member of the armed forces, is pregnant, or believes herself to be pregnant, or is living apart from his parents and managing his own financial affairs, to consent to their own medical and dental care, with the exception of abortion or sterilization services. It further allows married, widowed, or divorced minors to consent to any and all forms of medical care, including abortion without parental or judicial approval. See 1977 Mass. Adv. Sh. at 119.

The Appellees recognize that "not all distinctions between abortion and other procedures is forbidden . . . The constitutionality of such distinction will depend upon its degree and the justification for it." *Bellotti,* 428 U.S. at 149-150.

The distinctions made in Massachusetts are now multiple. A divorced minor may consent to abortion, while an unmarried minor may not. A minor who is pregnant

or believes herself to be pregnant may consent to all medical treatment except abortion and sterilization. A minor who is capable of giving informed consent to medical treatment may be treated without parental consent and without judicial interference, except when that medical treatment is abortion or sterilization.

Sterilization is fundamentally different from abortion. There are less drastic alternatives (contraceptives) to sterilization, while the alternatives to abortion are more dangerous, both physically and psychologically. Sterilization[15] is a permanent procedure, while abortion is of temporary nature since a minor can become pregnant in the future.

The minor who chooses to carry to term may receive all necessary treatment without the consent of her parents or any court.

> "Such a distinction is clearly inconsistent with *Roe* and *Doe* because this section of the Act singles out the abortion procedure as it applies to minors and places an extra layer of restrictions upon the effectuation of a minor's fundamental right to choose to have an abortion." *Planned Parenthood Ass'n* v. *Fitzpatrick,* 401 F.Supp. 554, 568 (E.D. Pa. 1975), *aff.* 428 U.S. 901 (1976). See also *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345 (1971); *State* v. *Koome,* 84 Wash.2d 901, 530 P.2d 260 (1975).

The irrationality of the distinction is obvious when one realizes that the statutory scheme allows a minor to give

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[15] The appellants admit "(T)eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion." (1 App. 406-407).

informed consent to major cardiac surgery, brain surgery, even a mastectomy, while denying her the opportunity for informed consent to the minor procedure of abortion.[16]

The *Wynn* Court found that in Illinois, like in Massachusetts,

> "a pregnant minor who chooses to give birth may consent to any medical or surgical treatment without the necessity of parental consent. Ill. Rev. Stat. ch. 91, § 18.1. That legislation presumes that pregnant minors are sufficiently knowledgeable and mature to consent knowingly. The State has suggested no reason why pregnant minors are less capable of deciding whether to terminate their pregnancy than they are to decide whether to carry their pregnancy to term, or even to have a Caesarian section, a far more dangerous procedure than a first trimester abortion. We hold, therefore, that the Act, at least in regard to the objective of informed decisions, is underinclusive because it includes mature and emancipated minors." *Wynn* at 1387.

No reason advanced by the Appellants can support these distinctions. Protection of the fetus has not been advanced as justification by the Appellants, nor could it be until the point of viability. *Roe* v. *Wade,* at 150-152, 163.[17] The other justifications raised would also apply to other medical or surgical procedures.[18] Yet only abortion has been

[16] Attention is called to the fact that a female at age 16 may legally consent to sexual intercourse (G.L. c. 265 §22A, 23, 24B). Additionally, a minor above the age of 12 must consent to his own adoption (G.L. c. 210 §2). Minors 14 or over may be tried for criminal offenses as adults instead of juveniles (G.L. c. 119 §61).

[17] §12S may also be overbroad in not distinguishing between trimesters.

[18] *Poe* v. *Gerstein,* 517 F.2d 787 (5th Cir. 1975) aff. 428 U.S. 901 (1976) sets forth various justifications at 792-794 and concludes that none of them "can meet the standard employed by *Roe*".

singled out. Therefore, the statute violates equal protection standards.

D. *The statute as interpreted employs a standard for parental and judicial consent that is vague and overbroad, so as to provide insufficient protection to a minor's right to privacy.*

The statute itself provides no explicit standard to be applied by a parent in deciding whether to consent to an abortion. The Supreme Court was clear that "(a)ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Danforth* at 75.

The Massachusetts Supreme Judicial Court construed the statute to mean that "so as to avoid any constitutional question, as far as possible, . . . the parent is to consider 'exclusively . . . what will serve the child's best interest.' " 1977 Mass. Adv. Sh. at 102.

However, parents cannot be charged with knowledge of this interpretation. The fact that the defendants ("the officials charged with enforcement of the statute", *Bellotti,* 428 U.S. 143) and a Senior District Judge (*Baird* I at 862-3) interpreted the statute to allow parental considerations other than the best interests of the minor, shows that the statute is easily misread. A parent may feel free to consider his/her religious beliefs, concern for the fetus or interest in the integrity of the family when deciding whether to give consent to the minor.

As in *Foe* v. *Vanderhoof,* 389 F.Supp. 947 (D. Colo. 1975), this statute violates the constitution by not specifying reasons for which consent may be withheld.

The defendants have admitted that "(s)ome parents of pregnant minors would under no circumstances consent

to an abortion." (1 App. 403-404). Other parents may withhold consent for various reasons unrelated to the minor's best interests. As the District Court said:

> "To have to go to court, in opposition to her parents' wishes, is a substantial burden on any minor. In this sensitive area, anything that needlessly and incorrectly increases the likelihood of this, imposes a burden that is constitutionally impermissible." *Baird* v. *Bellotti,* 428 F. Supp. 854, 856 (D. Mass. 1977) (*Baird* II).

The statute provides that if one or both the parents refuse consent, "consent may be obtained by order of a judge of the superior court for good cause shown . . ." The Supreme Judicial Court construed "that 'good cause' means that the judge may consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed." 1977 Mass. Adv. Sh. at 104.

Again there is no definition of the standard, no guidelines as to what should be considered. Furthermore, this determination has been entrusted to the Superior Court, which has not traditionally handled matters of this kind.[19]

The lack of explicit standards is even more serious since it allows a parent or a judge to override a minor's informed consent, made in conjunction with her physician's medical determination.[20] This veto power is clearly allowed under the statute:

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[19] G.L. c. 215 §§3 and 4 gives jurisdiction for custody matters to the Probate Courts. G.L. c. 208 §31 uses "best interests" standard for custody decisions.

[20] The medical judgment has already been made "in light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient." *Doe* v. *Bolton* at 192.

> "Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him." 1977 Mass. Adv. Sh. at 104.

This vagueness and overbreadth fails to provide sufficient protection to a minor's right to privacy.

II. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion To Conduct a Survey of Massachusetts Health Care Providers.

On August 1, 1977 the Appellants filed with the District Court a "Motion for Leave to Contact Members of Plaintiff Class." This motion was denied on August 2, 1977 without explanation. It is the general rule that with regard to discovery matters there is broad discretion in the trial court, "and it is unusual to find abuse of discretion in these matters." *Swanner* v. *United States,* 406 F.2d 716, 719 (5th Cir. 1969).

In this Court's decision in the earlier appeal of this case it was said that, "the importance of speed in resolution of the instant case is manifest." *Bellotti,* 428 U.S. at 151. Discovery for the *Baird* III trial was commenced by the Appellants in February, 1977. Appellants availed themselves of all the usual discovery devices: interrogatories, depositions, requests for admissions. Since, over six months had passed since discovery had been commenced and trial was

imminent, the District Court's action was clearly justifiable.

Furthermore, the question of the practices of private health care providers has little relevance, if any, to the matters at issue in this case. Plaintiffs have asserted no claim that private physicians should be required to accept minor patients without consent. What plaintiffs do assert is the right of the minor and her physician to decide together what action is appropriate without undue interference from the Commonwealth. It is state action that this case is concerned with, not private action.

Lastly, it should be noted that Appellants could have diminished any prejudice they may claim from the denial of this motion by presenting evidence on consent practices at trial. Having failed to avail themselves of this opportunity, they cannot now be heard to claim a reversible error on this ground.

III. The District Court Properly Allowed Plaintiffs' Facial Attack.

Appellants claim that the District Court erred in having allowed plaintiffs to maintain a facial attack against §12S for reason that so-called "immature minors" were not represented before the three-judge court.

Some background is essential. Appellees have consistently approached §12S as including only mature minors within its scope.[21] The statute reads,

> "If the mother is less than eighteen years of age and has not married, the *consent of both the* mother and her parents is required". . . (emphasis supplied)

[21] Appellees have defined mature minors as those capable of giving consent under §12S. Immature minors are those minors incapable of informed consent. Presumably, Appellants agreed to these definitions (1 App. 419).

Applying the rule of statutory construction that all parts of a statute must be given meaning, Appellees concluded that §12S was intended to apply only to minors who had the capacity to consent. To read the statute otherwise, would ascribe to the words "the consent of . . . the mother" no meaning. *Mass. Commission Against Discrimination* v. *Liberty Mutual Insurance Co.*, 1976 Mass. Adv. Sh. 2403. In *Wynn, supra,* at 1390, the Seventh Circuit with regard to the Illinois parental consent statute found that, "the Parental Consent Act [is] deficient because it fails to provide for minors who do not understand the consequences of an abortion."

There are other difficulties which arise in reading the statute so as to include immature minors. In no other legal proceeding in the Commonwealth is an incompetent person required to file a complaint on his own behalf, without any guardian.[22] Where medical treatment is indicated for an incompetent individual, the usual practice is for the physician to seek judicial approval. As previously noted, where a physician deems medical treatment to be indicated and the parents object, it is the physician who initiates action. *Custody of a Minor, supra.* See also *Superintendent of Belchertown* v. *Sackewicz,* 1977 Mass. Adv. Sh. 2461. Surely, the legislature could not have meant that incompetent minors were to be required to go to Court on their own behalf.

For reasons unknown to the Appellees, Appellants failed to inquire about Plaintiffs' position on immature minors until the last day of the second trial. If the issue had been raised at an earlier point, resolution of the question as to the meaning of the statute could have been raised before the Supreme Judicial Court or the District Court. Appellants should be precluded by their own tardiness from

[22] See Rule 17 of the Mass. Rules of Civil Procedure and Rule 17 of the Mass. Rules of Domestic Relation Procedure.

raising this issue so late in the proceedings. Had appellees been aware of an issue regarding the inclusion or non-inclusion of immature minors at least prior to the second trial, there would have been an opportunity to present evidence specifically addressed to the problem.

However, the evidence introduced regarding the deleterious effects of the statute is sufficiently ample to support the conclusion that an immature minor would suffer a constitutionally unsupportable burden by the application of §12S to her situation.

The District Court rightfully disregarded Appellants' arguments that there are an insufficient number of cases for whom the statute would have an unconstitutional application to justify the enjoining of §12S, stating that "the exact number of minors who are injured is unimportant. Particularly is this so when there is no practical reason for not protecting them." *Baird* III at 1002. Finally, in analyzing Appellants' chart (see Brief of the Appellants Bellotti et al at 67), the three-judge court concluded that Appellants overlooked "the fact that a minor's possible need of an abortion without her parents' knowledge is not limited to the first trimester . . . and that the great majority of abortions occur in the earlier months." *Baird* III at 1001. In fact, third trimester abortions are seldom, if ever, performed by Massachusetts physicians (2 App. 589).

The Constitution protects individuals. *Eisenstadt* v. *Baird, supra.* If the Attorney General's argument is accepted, only those instances where a sufficient number of adversely affected individuals existed could there be an adjudication of constitutional issues. This certainly is not the law.

IV. The District Court Was Correct In Entering a Permanent Injunction and In Refusing To Rewrite the Statute In Question.

The Appellants suggest that the District Court should have rewritten §12S in such a way as to give it constitutional validity. In his Brief, the Attorney Geneal argued that, "the District Court abused its remedial powers by refusing to sever the statute's offending provisions, adopt a limiting construction, or enter an injunction no broader than required to vindicate its view of a minor's constitutional rights." Brief of the Appellants Bellotti et al at 58. Rightfully, the District Court declined to avail itself of this opportunity stating,

> (T)he Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional informities.
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> [I]f a statute which, in terms, requires parental consultation without exception, can be "construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislatue intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible. *Baird* III at 1005-1006.

The District Court properly relied on this Court's decision in *United States* v. *Reese,* 92 U.S. 214 (1875). In

that case this Court was called to rule upon the issue of whether or not "a penal statute enacted by Congress . . . which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish . . . The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only." *Id.* at 221.

This Court held that the function of the courts was to "enforce the legislative will when ascertained, if within the constitutional grant of power." *Id.* at 221. Otherwise, the courts must "annul" the legislative "encroachments." The majority wrote that "to make a new law . . . is no part of our duty." *Id.* at 221.

The Attorney General maintains that the holding in *Reese* has now been limited to situations in which "a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." Brief of the Appellants Bellotti et al at 59. Assuming, *arguendo,* that the Attorney General is correct, §12S fits entirely within the scope of that limitation. §12S is a criminal statute. Mass. G.L. c. 112 §12Q mandates that the written consents required under §12S be delivered to the physician performing the abortion. Failure to obtain the consents of the proper persons can result in criminal sanctions under Mass. G.L. c. 112 §12T.[23]

Furthermore, the kind of massive revisions of §12S the Attorney General now seeks would cause the statute to have the same defects as the ordinance found void in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162

[23] Violation of these statutes also jeopardizes a physician's right to practice medicine within Massachusetts. Mass. G.L. c. 112 §5.

(1972) for its failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions." The legislature has had in the past and will again in the future have ample opportunity to correct the constitutional defects of §12S. *Baird* III at 1004.

The Attorney General's reliance on *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971) and *United States* v. *Raines,* 362 U.S. 17 (1960) is misplaced. In *Breckenridge* the statute in question was found constitutional as applied to the facts in the case. This case presents quite the opposite situation since the parties before this Court are the ones asserting the claim of unconstitutionality as applied to them. In *Raines,* the District Court dismissed an action for reason that the statute which the defendants who were public employees purportedly violated was unconstitutional since the statute could be applied to purely private action. This Court reversed, citing the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be also taken as applying to other persons or situations in which its application might be unconstitutional." *Raines* at 21. *Raines* again is clearly inapplicable to this case.

Other generally accepted rules of statutory construction and interpretation would be violated if the request of the Attorney General is followed. "In construing statutes courts must first look to the language of the legislation and if its language admits of no more than one meaning, the duty of interpretation does not arise." *United Shoe Workers of America, AFL-CIO* v. *Bedell,* 506 F.2d 174, 179 (1st Cir. 1974). When the provisions of a statute are clear and without ambiguity, there is no need for the courts to examine the statutory history or legislative intent. *Arkansas Valley Industries, Inc. Freeman,* 415 F.2d 713, 717

(8th Cir. 1969) §12S as construed by the Supreme Judicial Court is abundantly clear and unambiguous. Courts are not free to rewrite enactments of the legislature "to give effect to the judge's ideas of policy and fitness or the desirability of symmetry in statutes." *United States* v. *Shirah*, 253 F.2d 798, 800 (4th Cir. 1958).

The only justification for a judicial rewriting of a statute is if it is necessary "to avoid absurdity or frustration of the meaning and purpose of the statute." *Arkansas Valley Industries, supra,* at 718. That is clearly not the case here. The Attorney General suggests that by failing to revise the statute so as to make it constitutional the District Court has frustrated the expressed intent of the legislature to enact a constitutional statute.[24] This expression is however no more than an acknowledgment of the legislature's existing duty to abide within the Constitution, and as such is not a guide to the interpreting of §12S.

V. The District Court Properly Awarded Plaintiffs Their Costs, Including the Costs of Bellotti I Appeal.

The District Court, in *Baird* III at 1006, made an order that, "[p]laintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal lost because of defendants' mistaken advocacy." Earlier in its opinion, the three-judge court set forth in great detail the chameleon-like qualities of the defendants' position throughout the long course of this litigation.

At the first trial in the District Court (*Baird* I):

[24] The abortion related legislation of which §12S is a part was entitled "An Act to Protect Unborn Children and Maternal Health within Present Constitutional Limits". St. 1974, c. 706.

> ". . . defendants and all members of the court agreed that the statute recognized parents' rights as well as the minor's, and forbade any parent bypass."
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> . . .
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> On appeal to the Supreme Court defendants changed their position in a number of respects. They abandoned parents' rights; they asserted that parents must regard only the minor's interests in considering whether to consent, and asserted, further, that the statute permitted court poceedings without the parents' knowledge if in the minor's best interests. Finally, they agreed with our dissenting brother that the statute recognized the mature minor rule and that there could be no judicial override in such event."

On the basis of the representations of the Attorney General, this Court said:

> "The picture thus painted by the respective appellants is that of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.' " 428 U.S. at 145.

The Massachusetts Supreme Judicial Court, in its response to the questions certified to it by the District Court, took another view. See *Baird* v. *Attorney General*, 1977 Mass. Adv. Sh. 96, 360 N.E. 2d 288 (1977).

> "The Massachusetts court determined that the legislature was 'explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion.' N.E. 2d at 294. Faced with the loss of this alleviating feature, defendants now take the position that there are not enough cases calling for an exception to mandatory consultations." *Baird* I at 1000.

The defendants' attempt to excuse these vacillations as being attributable to a change during the course of litigation in the incumbent holding the office of Attorney General. F.R. Civ. P. 25(d)(1) provides in part that:

> "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."[25]

Therefore, since it is the office of Attorney General who is the defendant and not the particular individual who holds the office, Appellants cannot rely on any change in officeholder to justify the extra burden which plaintiffs have had to bear because of their shifting positions.

Appellants further rely on Mass. G.L. c. 112 §3 which obligates the Attorney General to appear in all suits in which the Commonwealth is a party or has an interest. However, it is the Attorney General who determines the manner in which this litigation is carried out and who has ultimate control over the litigation. In *Feeney* v. *Commonwealth*, 1977 Mass. Adv. Sh. 1959, 366 N.E. 2d 1262 (1977), the Supreme Judicial Court determined that the Attorney General could prosecute an appeal from the District Court to this Court over the objections of the state officers

[25] Rule 25(d)(1) of the Massachusetts Rules of Civil Procedure is identical to the Federal Rule.

whom he represented. The Attorney General also has the power to decide not to take an appeal when the public officer he represents wants an appeal prosecuted. *Secretary of Administration and Finance* v. *Attorney General*, 367 Mass. 154, 326 N.E. 2d 334 (1975). The only limits placed on the Attorney General are a "common law duty to represent the public interest . . ." 366 N.E. 2d at 1266, and a requirement that his powers ". . . may not be used in an arbitrary, capricious or illegal manner . . ." *Id.* at 1267.

With so much control over litigation affecting the public interest, it would seem incumbent upon the office of the Attorney General to formulate consistent policies with regard to the litigation in which it is engaged. In other words, if the Attorney General does not know what his own clients (i.e., the legislature) had in mind, how can the plaintiffs, the classes they represent, the Courts or the general public? If the Attoney General had maintained a consistent position throughout, much of this lengthy litigation, namely the second District Court trial and the second appeal to this Court, might easily have been avoided. Plaintiffs should not be expected to share the costs of the unnecessary prolongation of this litigation, and, therefore, the District Court order for costs should be affirmed.

Conclusion

For the reasons set out in this brief, the Court should affirm the judgment of the District Court and award costs to Appellees.

Respectfully submitted,

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